92-1233

No. _____

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

COLLINS PINE COMPANY AND COLLINS PINE COMPANY, T/D/B/A KANE HARDWOOD DIVISION,

Petitioners,

v.

WILLIAM R. ROLICK

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals For the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether OSHA regulations may be invoked in a civil proceeding by an independent contractor in an attempt to establish negligence despite express statutory language prohibiting the regulations from being used to expand or otherwise affect the common law liability of an employer?

2. Whether a court of appeals may disregard Federal Rule of Civil Procedure 49(a) and refuse to give binding effect to dispositive factual determinations that support a jury's special verdict, particularly where one party has not only failed to request the submission of factual issues to the jury, but has affirmatively opposed a jury determination on factual matters that support the special verdict?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below were petitioners Collins Pine Company and Collins Pine Company t/d/b/a Kane Hardwood Division* and respondent William R. Rolick.

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* Collins Pine Company is an Oregon corporation with no parent company. Collins Pine Company t/d/b/a Kane Hardwood Division is a wholly-owned subsidiary of Collins Pine Company.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE PETITION	9
I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THE EXPRESS DIRECTIVES OF OSHA AND CREATES A CONFLICT AMONG THE CIRCUITS WITH RESPECT TO OSHA'S PROHIBITION AGAINST USING THE REGULATIONS TO ENLARGE OR OTHERWISE AFFECT AN EMPLOYER'S COMMON LAW LIABILITY	9
II. THE DECISION OF THE COURT BELOW CONTRAVENES THE MANDATES OF THE FEDERAL RULES OF CIVIL PROCEDURE	12
CONCLUSION	17
APPENDIX	

TABLE OF AUTHORITIES

Cases **Page**

Bally v. Legg Mason Wood Walker, Inc., 925 F.2d 682 (3d Cir.), *cert. denied*, 112 S. Ct. 79 (1991) 12
Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) 13
Barrerra v. E.I. DuPont De Nemours and Co., Inc., 653 F.2d 915 (5th Cir. 1981) 9
Berman v. Radner Rolls, Inc., 542 A.2d 525 (1988) 15
Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979), *cert. denied sub nom. Borough of Doylestown v. Bradshaw*, 446 U.S. 909 (1980) 16
Chambers v. Nasco, Inc., 111 S. Ct. 2123 (1991) 13
Crane v. I.T.E. Circuit Breaker Co., 278 A.2d 362 (1971) 15
Getty Petroleum Corp. v. Island Transp. Corp., 878 F.2d 650 (2d Cir. 1989) 13, 15
Hahn v. Atlantic Richfield Co., 625 F.2d 1095 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981) 12
Hinshaw v. New England Mut. Life Ins. Co., 104 F.2d 45 (8th Cir.), *cert. denied*, 308 U.S. 583 (1939) 13
Horn v. C. L. Osborne Contracting Co., 591 F.2d 318 (5th Cir. 1979) 10
Hyde v. Land-of-Sky Regional Council, 572 F.2d 988 (4th Cir. 1978) 13
Melerine v. Avondale Shipyards, Inc., 659 F.2d 706 (5th Cir. 1984) 10, 11
Minichello v. U. S. Indus., Inc., 756 F.2d 26 (6th Cir. 1985) 10
Merritt v. Bethlehem Steel Corp., 875 F.2d 603 (7th Cir. 1989) 10
Ogden Food Serv. Corp. v. Mitchell, 614 F.2d 1001 (5th Cir. 1980) 13
Rad Serv., Inc. v. Aetna Casualty and Surety Co., 808 F.2d 271 (3d Cir. 1986) 12

Rideau v. Parkem Indus. Serv., Inc.,
917 F.2d 892 (5th Cir. 1990) 12
Ries v. National R.R. Passenger Corp.,
960 F.2d 1156 (3d Cir. 1992) 10, 11
Rolick v. Collins Pine Co.,
708 F.Supp. 111 (W.D. Pa. 1990) 4
Rolick v. Collins Pine Co., 925 F.2d 661
(3d Cir. 1991) . . . . . *passim*
Rolick v. Collins Pine Co., 975 F.2d 1009
(3d Cir. 1992) . . . . . *passim*
Smallwood v. Pearl Brewing Co., 489 F.2d 579
(5th Cir.), *cert. denied*, 419 U.S. 873 (1974) 16

Statutes

Occupational Safety and Health Act of 1970, 29 U.S.C.
§ 651 *et seq.* (1988) 2, 5, 9
29 U.S.C. § 653(b)(4) 2, 9, 11
29 U.S.C. § 666 11
28 U.S.C. § 1254 (1988) 2
28 U.S.C. § 1332 (1988) 3

Federal Regulations and Rules of Court

29 C.F.R. § 1910.5(d) 5, 9
29 C.F.R. § 1910.266(c)(3)(ii) 5
Fed. R. Civ. P. 49(a) 3, 12, 13

Miscellaneous

5A J. Moore & J. Lucas, *Moore's Federal Practice*
¶ 49.03[4] (2d ed. 1992) 13
9 C. Wright & A. Miller, *Federal Practice and Procedure*
§ 2507 (1971) 13

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COLLINS PINE COMPANY AND COLLINS PINE COMPANY, T/D/B/A KANE HARDWOOD DIVISION,

Petitioners,

v.

WILLIAM R. ROLICK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Collins Pine Company and Collins Pine Company t/d/b/a Kane Hardwood Division respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit entered in this case on September 23, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 975 F.2d 1009 (3d Cir. 1992). (App. 1a-15a). An earlier opinion of the United States Court of Appeals for the Third Circuit in this case is reported at *Rolick v. Collins Pine Co.*, 925 F.2d 661 (3d Cir. 1991). (App. 20a-30a).

JURISDICTION

The order of the United States Court of Appeals for the Third Circuit vacating the judgment of the district court was entered on September 23, 1992. (App. 16a-17a). Petitioners' timely petition for rehearing was denied on October 20, 1992. (App. 18a-19a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1988).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Occupational Safety and Health Act, 29 U.S.C. § 653, provides in pertinent part:

> Nothing in this chapter shall be construed . . . to enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries . . . of employees arising out of, or in the course of, employment.

29 U.S.C. § 653(b)(4) (1988).

Federal Rule of Civil Procedure 49(a) provides in pertinent part:

> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. . . . The court shall give to the jury such explanation and instruction concerning the matter as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

Fed. R. Civ. P. 49(a).

STATEMENT

This diversity action[1] arises out of a logging accident that occurred on January 14, 1985 when a live birch tree struck respondent and rendered him a quadriplegic. Respondent was an experienced logger who was hired as an independent contractor for the purpose of clear cutting a 35 acre tract of land containing approximately 7000 merchantable trees in the Allegheny National Forest.[2] As an independent contractor, respondent "set his own

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[1] Respondent is a citizen of Pennsylvania, and petitioners are Oregon corporations. The asserted basis for jurisdiction in the district court was therefore diversity jurisdiction under 28 U.S.C. § 1332 (1988).

[2] Petitioner Kane Hardwood contracted with the United States Department of Agriculture, Forest Service, to cut and remove the timber from the 35 acre tract of land. Kane Hardwood also contracted with Nortim Corporation to, *inter alia*, select and hire the loggers who would actually perform the logging operations on the land. Nortim in turn engaged respondent to cut and haul the timber pursuant to a Cutting and Hauling Agreement. No employees of petitioners were actually involved

hours, provided his own tools, hired his own workers, and accomplished the desired results [of his work], all by his own methods." *Rolick v. Collins Pine Co.*, 925 F.2d 661, 665 (3d Cir. 1991). (App. 28a-29a).

On January 9, 1987, respondent instituted this action, alleging, *inter alia*, that petitioners negligently caused respondent's injuries by failing to mark or remove dead trees from the cutting area where respondent was injured. Following a bench trial on the specific issue of respondent's employee/independent contractor status, the district court dismissed respondent's complaint, holding that respondent was a statutory employee of petitioner Kane Hardwood for purposes of the Pennsylvania Worker's Compensation Act. The district court therefore ruled that respondent's claims were barred because petitioners were immune from suit under Pennsylvania's statutory employer defense. *Rolick v. Collins Pine Co.*, 708 F. Supp. 111 (W.D. Pa. 1990).

Respondent appealed the dismissal of his complaint to the United States Court of Appeals for the Third Circuit. On appeal, respondent contended that his claims should not have been dismissed because he was an independent contractor and not the statutory employee of petitioner Kane Hardwood. The Third Circuit agreed and reversed the district court's determination that Kane Hardwood was respondent's statutory employer for purposes of immunity from suit. In so ruling, the court of appeals reasoned, *inter alia*, that respondent was, by contract, "solely responsible for the methods used and the manner in which all [his] . . . obligations [under his contract were] fulfilled."[3] *Rolick*, 925 F.2d at 665 (App. 29a). The Third Circuit also

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in cutting and/or hauling the timber from the cutting area where respondent was injured.

[3] One of respondent's specific contractual obligations was to "observe all rules, regulations, and ordinances relating to any work performed hereunder, including . . . the Occupational Safety and Health Act . . . ."

concluded that respondent "had exclusive control of the manner of performing his work." *Id.* at 666 (App. 30a).

On remand to the district court for a trial on the merits of respondent's claims, petitioners moved in limine to exclude any reference to the Occupational Safety and Health Act ("OSHA") and the accompanying regulations as a basis for establishing petitioners' asserted liability. Specifically, petitioners moved to preclude the introduction of any evidence relating to an OSHA logging regulation that provides:

> Dead, broken or rotted limbs or trees that are a hazard (widow-makers) shall be felled or otherwise removed before commencing logging operations, building roads, trails or landings in their vicinity.

29 C.F.R. § 1910.266(c)(3)(ii). The basis for petitioners' motion was that the Third Circuit had judicially determined that respondent was an independent contractor, and therefore, the OSHA regulation was inapplicable since its application is expressly limited to employees.[4] The district court granted petitioners' motion and excluded the OSHA regulation from evidence.

Throughout the trial of his claims, respondent's primary theory of liability -- and the one to which the excluded OSHA regulation related -- was that the birch tree that injured him was dead and

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[4] The OSHA regulations contain an express limitation on the application of the regulations to "employees." Specifically, the regulations provide:

> In the event a standard protects on its face a class of persons larger than employees, the standard shall be applicable under this part only to *employees* and their employment and places of employment.

29 C.F.R. § 1910.5(d) (emphasis added).

that petitioners negligently failed to mark or remove that tree prior to the commencement of respondent's logging operations. In support of this theory, respondent called two expert witnesses to testify about the birch tree's allegedly dead condition and one expert witness to testify about logging industry standards that require the identification or removal of dead trees prior to the start of logging operations. Respondent's logging industry expert testified, *inter alia*, that an industry standard promulgated by the American Pulpwood Association (which was equivalent to the excluded OSHA regulation) was the most generally recognized standard in the eastern United States at the time of respondent's accident and required the identification or removal of dead trees. Respondent's counsel also quoted to the jury the exact language contained in the excluded OSHA regulation during his cross-examination of one of petitioners' witnesses.

To rebut respondent's claim that the birch tree was dead, petitioners presented evidence from four fact witnesses and an expert forest pathologist, all of whom testified that the birch tree that injured respondent was alive and healthy at the time of respondent's accident. Petitioners also presented evidence that, *inter alia*, established that respondent was responsible for creating any hazard associated with the tree that injured him, that the allegedly hazardous nature of the birch tree was open and obvious and that respondent was aware of the birch tree's allegedly dangerous condition.

Thus, both parties proceeded during trial on the basis that the birch tree's condition was a dispositive factual predicate to liability. In light of this fact, petitioners submitted and requested a special interrogatory that would have required the jury to determine whether the birch tree that injured respondent was alive at the time of respondent's accident. Petitioners also requested special interrogatories that would have required the jury to make specific factual findings with respect to the factual predicates to petitioners' duty and liability as a possessor of land under Pennsylvania law. Respondent, however, affirmatively opposed

the submission of all these questions to the jury, contending first that petitioners' liability was not dependent on whether the birch tree was dead or alive, and second, that the submission of fact-specific interrogatories to the jury would only confuse the issues for the jury.

Because of respondent's opposition, the district court refused to submit petitioners' proposed special interrogatories to the jury. However, the district court did submit a special verdict form to the jury that required the jury to determine factual issues relating to the parties' respective negligence. Following their deliberations, the jury returned a special verdict of "no negligence" in favor of petitioners, and the district court subsequently entered a judgment on the special verdict in petitioners' favor.

The Third Circuit vacated the district court's judgment and held that the district court had abused its discretion in excluding the OSHA regulation as evidence of petitioners' alleged negligence.[5] *Rolick*, 975 F.2d 1009, 1014 (3d. Cir. 1992) (App. 9a-10a). In reaching this conclusion, the court of appeals refused to address the scope OSHA's duty provisions and then summarily concluded: "We can think of no reason under the federal rules of evidence why the OSHA regulation is not relevant evidence of the standard of care once it is determined, as we have done, that under Pennsylvania law [petitioners] could owe [respondent] a duty of care." *Id.* at 1014 (App. 10a).

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[5] The court of appeals affirmed the district court's *in limine* ruling excluding OSHA as a basis for establishing negligence per se. *See Rolick*, 975 F.2d 1009, 1014-15 (3d Cir. 1992) (App. 11a-12a). The court reasoned that OSHA itself prohibits the use of the regulations for such purposes and that "[f]or a federal court to do so would be to give perhaps a broader application to a federal regulation than does the federal substantive law itself, an anomaly at best." *Id.* at 1015 (App. 12a).

In reversing and remanding for a new trial, the Third Circuit also refused to give binding effect to several dispositive facts that were supported by petitioners' evidence and required to be construed in petitioners' favor under Federal Rule of Civil Procedure 49(a). In particular, the court of appeals declined to grant petitioners the benefit of significant lay and expert testimony that established that the birch tree that injured respondent was alive and not in a dead or rotted condition, thus negating the applicability of the excluded OSHA regulation. Instead, the court summarily opined that "defendants ask this court to accept a possible factual conclusion that could have been drawn by the jury." *Id.* at 1013 (App. 8a)

The court below likewise refused to give effect to the facts of record (and in some instances, uncontradicted facts) that established petitioners' lack of duty and/or liability under applicable Pennsylvania law. The Third Circuit did so despite the fact that the court itself opined: "We certainly agree that on the evidence before it the jury could justifiably have reached the result suggested by [petitioners], [*i.e.*, that they owed no duty to respondent and/or breached no duty that may have been owed.]" *Id.* at 1012 (App. 5a).

On October 6, 1992, petitioners filed a timely petition for panel rehearing with a suggestion for rehearing in banc. The court of appeals denied petitioners' petition on October 20, 1992. (App. 18a-19a).

REASONS FOR GRANTING THE PETITION

I. THE THIRD CIRCUIT'S DECISION CONFLICTS WITH THE EXPRESS DIRECTIVES OF OSHA AND CREATES A CONFLICT AMONG THE CIRCUITS WITH RESPECT TO OSHA'S PROHIBITION AGAINST USING THE REGULATIONS TO ENLARGE OR OTHERWISE AFFECT AN EMPLOYER'S COMMON LAW LIABILITY

The Third Circuit's decision goes beyond the express limitations that OSHA itself imposes on the permissible use of the OSHA regulations. Section 653(b)(4) of OSHA explicitly prohibits the invocation of the regulations "to enlarge . . . or affect in any other manner the common law . . . duties or liabilites of employers . . . with respect to injuries . . . of employees arising out of, or in the course of, employment." 29 U.S.C. § 653(b)(4). By sanctioning the use of OSHA regulations as evidence of a standard of care in a civil proceeding seeking compensatory damages, the Third Circuit has accomplished indirectly what OSHA itself forbids, and thus, the decision below contravenes OSHA's directives.[6]

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[6] The decision below is also contrary to OSHA's mandates inasmuch as it effectively permits the OSHA regulations to be invoked in the absence of an employer-employee relationship. OSHA clearly delineates that its application is circumscribed to situations involving "employers" and "employees." *See generally* 29 U.S.C. § 651 *et seq.* Indeed, the OSHA regulations specifically direct that "[i]n the event a standard protects on its face a class of persons larger than *employees*, the standard shall be applicable under this part *only to employees and their employment and places of employment.*" 29 C.F.R. § 1910.5(d)(emphasis added). Here, the Third Circuit has already judicially determined that respondent was an independent contractor who "had exclusive control of the manner of performing the work." *Rolick*, 925 F.2d at 666 (App. 30a). Consequently, OSHA is statutorily inapplicable to the independent contractor relationship that existed between petitioners and respondent. *See Barrerra v. E.I. DuPont De Nemours & Co., Inc.*, 653 F.2d 915,

The decision of the Third Circuit is equally in direct conflict with the Seventh Circuit's interpretation of Section 653(b)(4). In *Merritt v. Bethlehem Steel Corp.*, 875 F.2d 603, 608 (7th Cir. 1989), the Seventh Circuit upheld the exclusion of an OSHA regulation as evidence of a standard of care, holding that the express language of Section 653(b)(4) prohibits the regulations from being invoked in an attempt to establish a landowner's duty of care for injuries sustained by the employee of an independent contractor. *See also Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1167-68 (3d Cir. 1992)(Nygaard, J., concurring) (OSHA cannot be used as evidence of an employer's negligence because OSHA itself prohibits such application). *Cf. Minichello v. U.S. Indus., Inc.*, 756 F.2d 26, 29 (6th Cir. 1985)("OSHA regulations can never provide a basis for liability because Congress has specified that they should not."). The Third Circuit's ruling here is contrary to the *Merritt* court's construction of OSHA's mandates, and the petition should therefore be granted in order to resolve this conflict among the circuits.

The reasoning employed by the court below in reaching its conclusion that OSHA is admissible as evidence of negligence highlights the necessity for granting the petition. In rendering its opinion, the Third Circuit reasoned that the jury was "completely unaware that in its OSHA dress the regulation was much more significant because it constituted *a nationwide legal standard in all OSHA enforcement actions*." *Rolick*, 975 F.2d at 1014 (App.

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920 (5th Cir. 1981)("OSHA does not create duties between employers and invitees, only between employers and their employees."); *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 712 (5th Cir. 1981)("[T]he class of persons protected by OSHA comprises only employers' own employees."); and *Horn v. C.L. Osborn Contracting Co.*, 591 F.2d 318, 321 (5th Cir. 1979).

11a)(emphasis added).[7] The court therefore expressly recognized that the imprimatur of a federal standard of care through the invocation of the OSHA regulations is likely to have a great, and perhaps controlling, effect on the jury's determination of petitioners' common law duties and liabilities to respondent. Such a result is strictly forbidden by Section 653(b)(4).

Moreover, "Congress has established an elaborate system of *administrative* civil and criminal penalties for punishing OSHA violations in 29 U.S.C. § 666. Indeed, *the purpose of OSHA is preventive rather than compensatory*." *Ries v. National R.R. Passenger Corp.*, 960 F.2d at 1164 (emphasis added). *See also Melerine*, 650 F.2d at 709. Accordingly, an "OSHA enforcement action" to which the Third Circuit makes reference is the proper type of proceeding in which to invoke the OSHA regulations, not this civil proceeding seeking compensatory damages. By permitting the OSHA regulations to be invoked under circumstances in which they are statutorily inapplicable, the Third Circuit has, in its own words, "give[n] perhaps a broader application to a federal regulation than does the federal substantive law itself, an anamoly at best." *Rolick*, 975 F.2d at 1015 (App. 12a).

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[7] The Third Circuit also attempted to rationalize its ruling by writing: "It is important to reiterate that to use the OSHA regulation as evidence here is not to apply the OSHA itself to this case. Rather, it is to 'borrow' the OSHA regulation for use as evidence of a standard of care owed to plaintiff." *Rolick*, 975 F.2d at 1014 (App. 10a). Despite this language, it is clear that permitting respondent to tell the jury what OSHA says is an application of OSHA to the facts of this case. The regulation is not merely "borrowed," but is itself permitted to be used as substantive evidence in support of respondent's claim of negligence.

II. THE DECISION OF THE COURT BELOW CONTRAVENES THE MANDATES OF THE FEDERAL RULES OF CIVIL PROCEDURE

The Third Circuit's refusal to give binding effect to dispositive evidence supporting the jury's special verdict is contrary to established principles of federal practice and the clear mandates of Federal Rule of Civil Procedure 49(a).[8] Rule 49(a) directs that if, when submitting special interrogatories to the jury,

> the court omits *any issue of fact raised by the pleadings or by the evidence*, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such a demand the court may make a

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[8] In addition to circumventing the express mandates of Rule 49(a), the court of appeals' decision here also contravenes the more general principle that a verdict winner is entitled to have all facts and inferences construed in its favor on appeal. In *Rad Serv., Inc. v. Aetna Casualty and Surety Co.*, 808 F.2d 271 (3d Cir. 1986), the Third Circuit cogently expressed this fundamental precept of appellate review as follows:

> A jury verdict carries with it the benefit of all reasonable inferences capable of being drawn therefrom, and *an appellate court is bound to interpret the evidence in the light most favorable to the verdict winner*. [Citations omitted.] *Any fact that the jury could have reasonably inferred from the evidence in favor of the verdict winner will be presumed to have been so inferred when the court reviews the record supporting the verdict.*

Id. at 280 (quoting *Hahn v. Atlantic Richfield Co.*, 625 F.2d 1095, 1099 (3d Cir. 1980), *cert. denied*, 450 U.S. 981 (1981))(emphasis added). *See also Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682, 685 (3d Cir.), *cert. denied*, 112 S. Ct. 79 (1991); *Rideau v. Parkem Indus. Serv., Inc.*, 917 F.2d 892, 897 (5th Cir. 1990)("On appeal, we are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination.").

> finding; or *if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.*

Fed. R. Civ. P. 49(a)(emphasis added). This rule, like all of the rules of civil procedure, is, "in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). *See also Chambers v. Nasco, Inc.*, 111 S. Ct. 2123, 2144 (1991)(Kennedy, J., dissenting).

While this Court has yet to address Rule 49(a), the lower federal courts have consistently applied this rule in upholding special verdicts. *See, e.g., Getty Petroleum Corp. v. Island Transp. Corp.*, 878 F.2d 650, 656 (2d Cir. 1989)(district court presumed to have found that defendant's conduct confused consumers in Lanham Act case); *Hyde v. Land-of-Sky Regional Council*, 572 F.2d 988, 991 (4th Cir. 1978)(trial court was deemed to have made findings that there was authority and/or ratification for contract where issues were not specifically submitted to jury); *Ogden Food Serv. Corp. v. Mitchell*, 614 F.2d 1001, 1003 (5th Cir. 1980)(trial court impliedly made finding on issue of causation consistent with special verdict); *Hinshaw v. New England Mut. Life Ins. Co.*, 104 F.2d 45, 49 (8th Cir.), *cert. denied*, 308 U.S. 583 (1939)(district court presumed to have made findings consistent with special verdict). Noted commentators on federal practice and procedure have similarly construed Rule 49(a) as mandating that special verdicts be upheld on the basis of implied findings consistent with the judgment entered on the special verdict. *See* 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 49.03[4] at 49-35 (2d ed. 1992) ("When a party fails to request the court to submit an issue and the court omits to make an express finding, the rule goes further to support judgments on special verdicts by implying findings in accord with the judgment rendered."); 9 C. Wright & A. Miller,

Federal Practice and Procedure, § 2507 at 505 (1971)(if trial judge does not make express findings, "it will be presumed on appeal that he made whatever finding was necessary in order to support the judgment that he entered.").

The Third Circuit in this case failed to adhere to the explicit mandates of Rule 49(a) in two critical and dispositive respects. First, on the controlling question of whether the birch tree that injured respondent was alive or dead,[9] the court refused to grant petitioners the benefit of significant expert and lay testimony that established that the tree in question was alive and not in a dead or rotted condition. (R. 190A-192A, 194A, 196A-199A, 200A-206A, 211A, 222A-223A, 476A-478A, 483A, 500A, 503A-504A, 522A, 525A and 531A-532A). Instead, the court below simply dismissed this dispositive evidence, summarily opining that "defendants ask this court to accept a possible factual conclusion that could have been drawn by the jury." *Rolick*, 975 F.2d at 1013 (App. 8a). This disposition contravenes the explicit directives of Rule 49(a) because respondent failed to request specifically that the question of the birch tree's condition, which was clearly placed in issue by the pleadings and by the evidence, be submitted to the jury. In fact, the record unequivocally reveals that respondent *affirmatively opposed* petitioners' request that the issue of the birch tree's condition be submitted for specific determination by the jury. (R. 584A-593A). Consequently, respondent not only waived his right to a jury trial on this issue,

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[9] Respondent's overriding theory of negligence at trial was that petitioners failed to mark or remove *dead* trees from the cutting area where respondent was injured. Indeed, this is the only reason respondent attempted to use the OSHA regulation to establish petitioners' alleged negligence. Accordingly, respondent's sole contention at trial with respect to the excluded OSHA regulation was that the birch tree that injured him was dead or rotted and therefore came within the ambit of the regulation. If the birch tree was neither dead nor in a rotted condition, the regulation is inapplicable, and there could have been no reversible error in excluding it from evidence at trial.

but the district court must "be deemed to have made a finding [that the birch tree was alive and healthy] in accord with the judgment on the special verdict." Fed. R. Civ. P. 49(a). *See also Getty Petroleum Corp.*, 878 F.2d at 656 (implied findings deemed to have been made by district court, particularly where losing party urged court not to submit specific issues to the jury).

The Third Circuit similarly refused to give binding effect to the facts of record (and in some instances, *uncontradicted* facts) that established petitioners' lack of duty and liability as a possessor of land under Pennsylvania law.[10] The court below apparantly recognized that petitioners' evidence was sufficient to negate petitioner's duty and liability to respondent because the court opined that "[w]e certainly agree that on the evidence before it the jury could justifiably have reached the result suggested by defendants[, *i.e.*, that they owed no duty to respondent and/or breached no duty that may have been owed]." *Rolick*, 975 F.2d at 1012 (App. 5a). Yet, the court then refused to give effect to

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[10] The record forcefully establishes that, among other things, respondent was responsible for creating any hazard that may have been associated with the birch tree that injured him (R. 472A-473A, 483A-484A, 492A-493A and 518A), negating petitioners' duty as a matter of Pennsylvania law. *See, e.g., Crane v. I.T.E. Circuit Breaker Co.*, 278 A.2d 362, 364 (1971)("[D]uties cannot be imposed upon the possessor of land, if the defective conditions were created by the work of the independent contractor . . . ."). Likewise, the *uncontradicted* testimony of respondent's own witnesses established that the allegedly hazardous condition of the birch tree was open and obvious (R. 315A, 323A-325A, 340A-341A and 349A-350A), and petitioners' uncontradicted evidence established that respondent "looked the tree over for approximatedly two minutes," (R. 544A), establishing respondent's knowledge of the allegedly hazardous nature of the tree. As a matter of law, this evidence also negates any duty petitioners may have otherwise owed to respondent. *See, e.g., Berman v. Radner Rolls, Inc.*, 542 A.2d 525 (1988).

the jury's special verdict.[11] This disposition by the court of appeals also violates Rule 49(a) because respondent once again *failed to request that special interrogatories be submitted to the* jury concerning the factual predicates to petitioners' duty and liability. Rather, respondent once again *affirmatively protested* petitioners' request for the submission of such specific questions to the jury. (R. 361A-363A). Under Rule 49(a), as well as concepts of fundamental fairness and judicial economy, such affirmative opposition to the jury's determination of the specific factual predicates to petitioners' liability cannot be permitted to work in respondent's favor. *Cf. Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 602 n.30 (5th Cir.), *cert. denied*, 419 U.S. 873 (1974)("It would seem contrary to any concept of judicial economy to provide [plaintiff] with a second bite [here a third bite] of the apple when any responsibility for jury confusion must fall at his own door.").

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[11] The Third Circuit concluded that the jury's special verdict could not be given effect because the OSHA regulation -- which was equivalent to other standards introduced by respondent -- had been excluded from evidence. *See Rolick*, 975 F.2d at 1012 (App. 5a-6a). The OSHA regulation, however, had absolutely no bearing on petitioners' lack of duty under Pennsylvania law. Simply stated, the *facts* of record supporting the special verdict, which must be construed in petitioners' favor under Rule 49(a), established that petitioners owed no duty to respondent *as a matter of law*. Thus, irrespective of any standards that respondent may have introduced at trial, the Pennsylvania "no duty" rule operates to relieve petitioners of liability under the particular facts of this case. *See, e.g., Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979), *cert. denied sub nom. Borough of Doylestown v. Bradshaw*, 446 U.S. 909 (1980)("[A] negligence claim must fail if based on circumstances for which the law imposes no duty of care on the defendant.").

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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January 19, 1993

APPENDIX

Filed September 23, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3015

WILLIAM ROLICK

Appellant,

v.

COLLINS PINE COMPANY, and COLLINS PINE COMPANY/, t/d/b/a KANE HARDWOOD DIVISION

Appeal from the United States District Court
for the Western District of Pennsylvania

D.C. Civil No. 87-00005E

Argued July 7, 1992

BEFORE: SLOVITER, Chief Justice, STAPLETON and SEITZ, Circuit Judges.

Filed: September 23, 1992

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OPINION OF THE COURT

SEITZ, *Circuit Judge*.

William Rolick instituted this diversity action against two Oregon corporations, Collins Pine Company, and Collins Pine Company, t/d/b/a as Kane Hardwood Division. The district court had jurisdiction pursuant to 28 U.S.C. § 1332 (1988).

This court has jurisdiction of Rolick's appeal under 28 U.S.C. § 1291 (1988).

I. FACTS

Kane Hardwood Division (hereinafter referred to as "Kane" or collectively with Collins Pine Company as "defendants") contracted with the United States Forest Service for the timber rights to certain tracts of land, including Turkey Ridge, in

Pennsylvania's Allegheny National Forest. Kane then entered into a contract with Nortim Corporation ("Nortim") whereby Nortim agreed to select, hire and schedule the necessary individual loggers. Nortim, in turn, contracted with William Rolick ("plaintiff") to cut and haul the timber that Kane had agreed to purchase from the Forest Service.

Plaintiff was seriously injured while logging on Turkey Ridge. According to plaintiff, just prior to the accident he had felled a cherry tree in a small clearing. After watching the cherry tree fall, plaintiff recalls walking toward it to measure and mark it. He was struck from behind by an allegedly rotten birch tree and rendered quadriplegic.

Plaintiff instituted this action to recover damages for his personal injuries. He alleged several acts of negligence, recklessness and carelessness on the part of defendants as possessors of the land. The district court dismissed the action, holding that plaintiff was Kane's statutory employee and that defendants were therefore entitled to tort immunity under Pennsylvania's worker's compensation laws.

In a prior appeal, this court determined that plaintiff was an independent contractor as to Kane and reversed the court's order dismissing the action. *Rolick v. Collins Pine Co.*, 925 F.2d 661 (3d Cir. 1991). Thereafter the case went to trial before a jury on plaintiff's claim that defendants' conduct constituted negligence under Pennsylvania law. By special verdict, the jury found no negligence by defendants. We turn to the assigned errors.

II. DISCUSSION

A. Alternative Grounds For Affirming Judgment

Defendants advance two grounds upon which the judgment for them should be sustained. If either ground is meritorious, the

plaintiffs attack on the district court's rejection of certain evidence of the industry standard of care would not have to be reached. Though defendants advance these grounds to support a finding of harmless error, logic suggests that we consider them at the outset on their merits. Defendants' first basis for an affirmance rests on the application of Pennsylvania substantive law to the evidence offered at the trial. We turn to that issue.

Under Restatement (Second) of Torts § 343, a possessor of land must exercise reasonable care to protect invitees from non-obvious dangerous conditions on the land. Restatement (Second) of Torts § 343 (1965). Pennsylvania has adopted Restatement section 343 as its own. *See Atkins v. Urban Redevelopment Auth. of Pittsburgh*, 414 A.2d 100, 103-04 (Pa. 1980). The land possessor's duty extends to independent contractors as business invitees. *Crane v. I.T.E. Circuit Breaker Co.*, 278 A.2d 362, 363-64 (Pa. 1971). Defendants stipulated that they were "possessors" of the land under Pennsylvania law.

Although the duty owed to an independent contractor varies depending upon the control the possessor maintains over the work:

> it is a general rule that a possessor of the land must still use reasonable care to make the premises safe or give adequate and timely warning of dangers known to him but unknown to the contractor....

Id. at 364. Thus, it is clear that plaintiff, an independent contractor and business invitee, came within the general category of persons to whom defendants might owe a duty of care under Pennsylvania law as reflected in the Restatement of Torts

(Second).[1] But defendants argue that the evidence overwhelmingly showed that they breached no duty owed plaintiff under § 343 because: (1) no reasonable inspection on the part of defendants could have discovered the allegedly hazardous birch tree; (2) even if the birch tree presented a risk of harm, the risk was not unreasonable; and (3) they reasonably could have expected plaintiff to discover and appreciate the risk. Defendants also say that they breached no duty they owed to plaintiff because it is settled law in Pennsylvania that a possessor of land owes no duty of care to an independent contractor who creates the dangerous situation.

On the foregoing bases defendants say that the jury's verdict of no negligence is fully supported by the record, and therefore constitutes a primary basis for affirming the judgment in favor of defendants. *Seewagen v. Vanderkluet*, 488 A.2d 21, 24-25 (Pa.Super. 1985) (reasonableness of inspection and degree of risk presented); *Carrender v. Fitterer*, 469 A.2d 120, 124 (Pa. 1983) (whether hazard is obvious). We certainly agree that on the evidence before it the jury could justifiably have reached the result suggested by defendants.

Plaintiff contends, however, that in reaching its verdict the jury, because of the district court's ruling, did not have before it

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[1] § 343. Dangerous Conditions Known to or Discoverable by Possessor

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
(c) fails to exercise reasonable care to protect them against the danger.

material evidence of the standard of care owed by defendants to plaintiff. We subsequently determine herein that the OSHA standard of care regulation as evidence of the standard of care owed plaintiff was erroneously excluded by the district court and that its exclusion was not harmless. Thus, the jury was deprived of significant evidence. It follows that we cannot affirm the judgment on the ground that the evidence supported the jury verdict for defendants.

Defendants next argue that they were entitled to a directed verdict because the plaintiff failed to show a causal connection between his injuries and defendants' conduct. We address that issue.

Plaintiff testified that hazardous trees on Turkey Ridge where he was working were not marked prior to the commencement of logging operations. Thus, he says that he was not warned of the birch tree's deteriorated condition, or of the propensity of dead, dying or disturbed trees to fall due to ground tremors created by another falling tree. He testified that had he known about the effects of ground tremors he would have checked the trees in the area where he was preparing to cut to see if they were unstable.

Plaintiff went on to testify that he could have guarded further against the risk created by ground tremors by watching the suspect tree as he felled the healthy one. He stated that if he had seen a dead, dying or disturbed tree falling towards him, he would have had sufficient time to get out of the way. One of defendants' employees also testified that a logger was under no obligation to endanger himself by felling a hazardous tree. He testified further that if a logger became aware of a tree's hazardous condition, he could use equipment such as a bulldozer to bring the tree down safely.

We find that by testifying that he could have avoided the accident had he been made aware of the danger by some action of the defendants, plaintiff presented sufficient evidence of proximate

causation to create a jury question. Thus, the court did not err in denying the motion for a directed verdict on this ground.

B. Admissibility of Evidence of the OSHA Regulation

Plaintiffs expert, Dr. Winer, prepared a pretrial report in which he stated his opinion that defendants had failed to cause the logging operation to be conducted in accordance with industry standards incorporated in a regulation of the Occupational Safety and Health Act ("OSHA"), the American National Standards Institute ("ANSI"), the American Pulpwood Association ("APA"), and Washington and Oregon state codes. Defendants sought by motion a ruling *in limine* to bar the introduction of any direct or indirect evidence of the OSHA logging regulation, of other state codes dealing with pulpwood logging, and of the ANSI standard referred to in Dr. Winer's report.

Plaintiff attacks the district court's order barring, *inter alia*, the admission of the Pulpwood Logging safety regulation promulgated pursuant to the Occupational Safety and Health Act of 1970 ("OSHA"), 29 U.S.C. § 651 *et seq.* (1988).[2] The regulation provides:

> Dead, broken, or rotted limbs or trees that are a hazard (widow-makers) shall be felled or otherwise removed before commencing logging operations, building roads, trails, or landing, in their vicinity.

29 C.F.R. § 1910.266(c)(3)(ii) (1991).

Defendants assert at the outset that plaintiff abandoned his theory that defendants owed him the duty under the OSHA regulation covering the removal of dead or rotten hazardous trees by arguing at the conclusion of the trial that defendants were

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[2] The other evidence of the industry standard is treated subsequently herein.

required to remove all hazardous trees. However, plaintiffs argument at trial that the birch tree here involved presented a hazard because of its shallow roots is a valid argument based upon alternative pleadings permitted under Rule 8(e)(2) of the Federal Rules of Civil Procedure. We do not view plaintiff's broader argument at the conclusion of the trial as constituting an abandonment of the more specific argument that defendants owed a duty within the scope of the OSHA regulation.

Defendants also argue that the OSHA regulation is inapplicable by its own terms. They say that an overwhelming amount of evidence demonstrated that the birch tree which fell upon plaintiff was alive at the time of the accident and that the OSHA regulation requires only the identification and removal of dead or rotten trees. Once again defendants ask this court to accept a possible factual conclusion that could have been drawn by the jury. Our review of the record on this point convinces us that reasonable minds could differ as to the condition of the tree. Thus, it would be inappropriate for this court to rely on this ground to affirm the district court's exclusion of the OSHA regulation. *Seewagen v. Vanderkluet*, 488 A.2d 21, 25 (Pa.Super. 1985).

We turn now to plaintiff's attack on the court's *in limine* ruling precluding plaintiff from offering evidence through an expert witness as to the OSHA standard of care allegedly relevant to the logging operation here involved. Although no opinion was filed, we think the district court's ruling was based on its view that OSHA is limited to employees of an employer and since plaintiff was not an employee of Kane, the OSHA regulation was

inapplicable to him. We so infer from the court's colloquy with counsel.[3]

The courts of appeals that have spoken are divided on the scope of the OSHA duty provisions. 29 U.S.C. § 654.[4] This court has not addressed the issue and, under our view of this case, we need not do so.

The issue to be decided here is whether the OSHA regulation is admissible in a diversity action as evidence of the standard of care owed by the defendants to the plaintiff, not whether the OSHA itself controls that issue. Since the question involves the admission of evidence in a federal court, the Federal Rules of Evidence control. We do not understand the parties to contend otherwise. Thus, our review of the trial court's order excluding the evidence is for abuse of discretion. *Savarese v. Agriss*, 883 F.2d 1194, 1200 (3d Cir. 1989).

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[3] COURT: Do you think I could overrule the Third Circuit finding on independent contractors? He was an independent contractor.

COUNSEL: But what I'm saying, the OSHA, as we have set forth, the OSHA regulations apply to the workplace relationship irrespective of how the contractual relationship is analyzed whether its employer/employee, master/servant independent contractor --

COURT: I think you're right. That is our point of disagreement. Sustain the objection.

App. at 384-85.

[4] *Compare Barrera v. E.I. DuPont De Nemours & Co., Inc.*, 653 F.2d 915, 920 (5th Cir. 1981) and *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 711 (5th Cir. 1981) *with Brennan v. OSHRC*, 513 F.2d 1032, 1038 (2d Cir. 1975) and *Teal v. E.I. DuPont De Nemours & Co.*, 728 F.2d 799, 805 (6th Cir. 1984).

We can think of no reason under the Federal Rules of Evidence why the OSHA regulation is not relevant evidence of the standard of care once it is determined, as we have done, that under Pennsylvania law the defendants could owe plaintiff a duty of care. It is important to reiterate that to use the OSHA regulation as evidence here is not to apply the OSHA itself to this case. Rather, it is to "borrow" the OSHA regulation for use as evidence of the standard of care owed to plaintiff. This is precisely how the Pennsylvania state courts have employed OSHA regulations. *See e.g. Brogley v. Chambersburg Eng'g Co.*, 452 A.2d 743, 746 (Pa.Super. 1982). Thus, we conclude that it was not consistent with a sound exercise of discretion for the district court to exclude testimony covering the OSHA regulation.

Defendants assert, however, that any error committed by the district court in excluding OSHA evidence was harmless under Federal Rule of Evidence 1O3(a)[5] because the language of the OSHA regulation was admitted into evidence although it was identified only as the APA standard.[6] In consequence, as defendants say, the jury had the OSHA standard of care before it, albeit unidentified as such.

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[5] Rule 103(a) provides, in relevant part, that "[e]rrors may not be predicted upon a ruling which admits or excludes evidence unless a substantial right of the party is affected...." *See also* Fed.R.Civ.P. 61.

[6] The 1983 APA publication entitled "Safe Manual Felling," referenced in Dr. Winer's report, provides general guidelines for safe logging practice. It also contains a list of applicable OSHA regulations characterized as "mandatory safety standards." The text of OSHA regulation section 1910.266(c)(3)(ii) is among those listed. One of defendant's employees was called upon to read that language aloud at trial. App. at 276. In addition, Dr. Winer testified that according to the APA, hazardous trees "should be identified, at a minimum, and then, if possible, and with minimum delay, the hazard should be eliminated." App. at 119.

We believe, however, that this harmless error issue is not as simplistic as defendants suggest. The plaintiff's expert was limited before the jury to identifying and relying on the APA standard as the basis for his testimony. Thus, the jury was made aware only that the APA standard bore the imprimatur of an industry trade group. They were completely unaware that in its OSHA dress the regulation was much more significant because it constituted a nationwide legal standard in all OSHA enforcement actions. We are unwilling to say that the difference in the "quality" of proof as to the standard of care might not have been significant had the jury been aware of it. We therefore conclude that the exclusion of the OSHA standard of care, as such, may have substantially and adversely affected plaintiff's rights. So viewed, the error was not harmless. It is for this reason that we concluded earlier herein that we were unable to give effect to the jury's verdict.

C. OSHA and Negligence Per Se

Plaintiff filed a motion *in limine* seeking an order establishing defendants' negligence as a matter of law, subject to a showing of proximate cause, based upon defendants' allegedly admitted violation of the OSHA regulation. The district court denied the motion without opinion. We think it did so for precisely the reason it barred evidence of the OSHA standard, viz., that the OSHA regulation was inadmissible and thus, could not support plaintiff's request. We exercise plenary review over the district court's order because it involves the selection, interpretation and application of legal precepts. *Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir. 1986).

Plaintiff contends that Pennsylvania law permits him to use a violation of a statute or regulation as the basis for a finding of negligence per se. *Kaplan v. Phila. Transp. Co.*, 171 A.2d 166, 167 (Pa. 1961). He refers us to the so-called four part test identified in *Cecile Indus., Inc. v. United States*, 793 F.2d 97, 99-100 (3d Cir. 1986) (collecting Pennsylvania cases).

The difficulty with plaintiff's argument is that this court has held that due to the express statutory language of 29 U.S.C. § 653(b)(4) limiting its use, "a violation of an OSHA regulation could not constitute negligence per se." *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1165 (3d Cir. 1992). Given this interpretation of the OSHA for federal law purposes, we do not believe a federal court, even though exercising diversity jurisdiction, can apply the four part test of *Cecile Industries* to determine whether there was per se state law liability based on the OSHA regulation. For a federal court to do so would be to give perhaps a broader application to a federal regulation than does the federal substantive law itself, an anomaly at best. Indeed, applying the test identified in *Cecile Industries* could result in the district court's giving conclusive effect to an OSHA regulation in a diversity action whereas a Pennsylvania court hearing the same case would not. We say this because, as a Pennsylvania court has said in the context of deciding the relevance of another OSHA regulation: "'Proof of the violation of a statute or ordinance is permissible, not as conclusive proof of negligence, but as evidence to be considered with all other evidence in the case." *Wood v. Smith*, 495 A.2d 601, 603 (Pa.Super. 1985) (quoting 27 P.L.E. § 175 (1960) (emphasis added)), *appeal dismissed as improvidently granted*, 518 A.2d 266 (Pa. 1986); *see also* Restatement (Second) of Torts § 286 (1965). We therefore conclude that the district court did not err in denying plaintiff's motion *in limine* for a per se application of the OSHA regulation.

D. ANSI and State Law

Finally, we address the issue of whether the district court properly excluded plaintiff's proffered evidence of the standards set forth by the ANSI[7] and the duties imposed under

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[7] Section 2.3.5 of the "American National Standard-Safety Requirements for Pulpwood Logging" ANSI Standard 03.1-1971, is identical to the OSHA regulation on pulpwood logging.

Washington[8] and Oregon laws.[9] Since the district court did not articulate why it was excluding the ANSI and state law evidence, we are left to speculate. Defendants suggest that the district court's decision to exclude the evidence was justified because each cited regulation or standard had been superseded by the time of the accident.[10] Thus, defendants say that these regulations were

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[8] Dr. Winer's report provided the following Washington regulation:

> Q-8 Snags over 25 feet high shall be felled prior to logging in clear cut areas.

App. at 100 (citing to Safety Standards for Logging Operations, State of Washington).

[9] The Oregon regulation cited in Dr. Winer's report provides:

> 1.43 To as great a degree as is consistent with the best logging practice, all Dangerous Snags, and Trees within reach of work areas, roads or rigging shall be felled before the regular operations begin.

Safety Code for Logging, Supp. to the Basic Safety Code for the State of Oregon, section 1.43 (August 1, 1951), as promulgated by the State Industrial Accident Commission pursuant to Or. Comp. Laws Ann. §§ 102-1228 -1246 (1940). These safety regulations have the force and effect of law. *Arnold v. Gardiner Hill Timber Co.*, 263 P.2d 403, 405 (Or. 1953).

[10] The 1971 ANSI standard was withdrawn by the ANSI in the fall of 1984, six months prior to plaintiff's accident. Plaintiffs Brief at 21. The Oregon regulation cited by Dr. Winer was altered at least by 1958, *see* Safety Code for Logging. Supp. to the Basic Safety Code for the State of Oregon, section 1.12 (May 15, 1958). The Basic Safety Code itself was replaced by the Oregon Occupational Safety and Health Code. The earlier logging safety rule was maintained, in substantially the same form, however, in Or. Admin. Rules § 437-80-105 (1980), as amended by Or. Admin. Rules § 437-06-380 (1992). Similarly, the Washington regulation was replaced by a functionally equivalent regulation. Wash.

irrelevant. *See Mills v. Beech Aircraft Corp., Inc.*, 886 F.2d 758, 764 (5th Cir. 1989) (probability of confusion on the part of the jury as to relevance of code provision no longer in effect).

Plaintiff does not dispute the fact that Dr. Winer's report relied upon superseded regulations or standards. Instead, he contends that the evidence was admissible to reflect industry standards as part of the literature upon which Dr. Winer based his opinion. Plaintiff argues that the fact that the proffered standards have been superseded goes to the weight to be accorded the evidence, rather than its admissibility.

Because of our conclusion that the exclusion of the OSHA evidence constituted prejudicial error, we must reverse the district court's judgment for defendants and order a new trial. This action will afford plaintiff an opportunity to represent the ANSI and state law evidence to the district court for resolution of its admissibility on the present record or as amended. In this way, the basis for any ruling thereon can be made clear.

III. CONCLUSION

We will vacate the judgment of the district court.

We will reverse the *in limine* order of the district court to the extent it excludes evidence of the OSHA standard. We will affirm the *in limine* order of the district court denying plaintiff's motion requesting a finding of negligence per se. This appeal will be remanded to the district court for further proceedings consistent with this opinion.

Admin. Code. § 296-54-030 (1974).

The parties shall bear their own costs.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3015

WILLIAM ROLICK

Appellant,

v.

COLLINS PINE COMPANY, and COLLINS PINE COMPANY, t/d/b/a KANE HARDWOOD DIVISION

Appeal from the United States District Court
for the Western District of Pennsylvania

D.C. Civil No. 87-00005E

Present: Sloviter, *Chief Judge*, Stapleton and Seitz, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel July 7, 1992.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court entered

December 11, 1991, be, and the same is hereby vacated. The judgment is reversed as to the *in limine* order of the District Court to the extent it excludes evidence of the OSHA standard and affirmed as to the *in limine* order of the District Court denying plaintiff's motion requesting a finding of negligence per se. The cause is remanded to the District Court for further proceedings consistent with the opinion of this Court. The parties shall bear their own costs.

ATTEST:

/s/ Sally Mrvos

Clerk

Dated: September 23, 1992

Certified as a true copy and issued in lieu
of a formal mandate on October 28, 1992.

Attest: /s/ Sally Mrvos

Clerk, U.S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 92-3015

WILLIAM ROLICK

v.

COLLINS PINE COMPANY, and COLLINS PINE COMPANY, t/d/b/a KANE HARDWOOD DIVISION

SUR PETITION FOR REHEARING

Present: Sloviter, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH and SEITZ*, *Circuit Judges*

The petition for rehearing filed by appellee Collins Pine Company and Collins Pine Company t/d/b/a Kane Hardwood Division, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit

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* Honorable Collins J. Seitz, Senior Circuit Judge, as to panel rehearing only.

in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ D.J. Sloviter
Chief Judge

Dated: October 20, 1992

Filed February 5, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 90-3313

WILLIAM ROLICK,

Appellant,

v.

COLLINS PINE COMPANY; and
COLLINS PINE COMPANY,
t/d/b/a/ KANE HARDWOOD DIVISION

ON APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT
OF PENNSYLVANIA
(D.C. Civil No. 87-00005E)

Argued November 27, 1990

Before: BECKER and NYGAARD, Circuit Judges,
and POLLAK, District Judge*

---

* Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

(Opinion Filed February 5, 1991)

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*

In this diversity case we must decide whether William Rolick is an independent contractor or a statutory employee within the meaning of the Pennsylvania Workmen's Compensation Act, 77 Pa. Con. Stat. Ann. §§ 1-1603 (Purdon 1987) ("PWCA"). Rolick was a logger. One winter day while cutting timber in the Allegheny National Forest, Rolick was struck by a birch tree which broke his neck. He is now a quadriplegic. At the time of the accident, Rolick was cutting timber for the Nortim Corporation ("Nortim") and Collins Pine Company, Kane Hardwood Division ("Kane") and sued Kane to recover for those injuries. After a nonjury trial, the district court decided that Rolick was a statutory employee of Kane within the meaning of the PWCA and, therefore, dismissed his complaint, limiting Rolick to a remedy from workmen's compensation. We will reverse.

I.

Kane entered into a Timber Sale Contract with the United States Department of Agriculture, Forest Service, allowing Kane to cut and remove timber from a tract of land in Pennsylvania. Kane then entered into a Logging Services Contract with Nortim, a logging insurance group, to select, hire, schedule, and monitor loggers who would actually cut and haul the timber. Nortim agreed to make workmen's compensation insurance available to the loggers and introduce a mandatory safety awareness program. Nortim in turn hired the Pennsylvania Forestry Association to monitor and instruct the loggers on safety practices. Nortim employees also monitored the loggers to insure that the work was performed in accordance with contract requirements and provided field instructions on what and where to cut.

Rolick entered into a Cutting and Hauling Agreement with Nortim to fell, skid and/or haul the timber. The agreement designated Rolick an independent contractor and outlined his unconditional right to control work methods as well as his workmen. Nortim paid Rolick for the timber he cut, did not withhold social security or income tax from his check, and, because he was a contractor, issued him a 1099 federal tax form instead of an employee's W-2 form at the end of the year. Kane waived any right to control the loggers' methods, and the logging contract referred to them as independent contractors.

On the work site, Rolick performed his contractual obligations. Nortim never told him how to do the job, when to begin and end, how long to work, what tools and equipment to use or how many or which employees to use. Although Rolick understood that he would be considered an employee for workmen's compensation purposes, he actually paid for this coverage. Nortim merely deducted premium payments from Rolick's check.

While working under this agreement, Rolick suffered neck and back injuries from the falling tree and filed this suit. Following

a bench trial on the specific issue of Rolick's employee/independent contractor status, the court directed the parties to file memoranda on the applicability of section 302(a) and 302(b) of the PWCA, 77 Pa. Con. Stat. Ann. §§ 461, 462. The district court then dismissed Rolick's claim, concluding Rolick was an employee within the meaning of the PWCA, a statutory employee of Kane, and limited by Pennsylvania law to his workmen's compensation remedy.

II.

The sole issue on appeal is whether the district court properly concluded that Kane was Rolick's statutory employer and entitled to tort immunity. The material facts are not at issue. The district court's decision depends upon interpretation and application of Pennsylvania law. Thus, our review is plenary. *Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir. 1986).

A.

The PWCA provides benefits to injured employees regardless of fault. *See* 77 Pa. Con. Stat. Ann. § 1-1603 (Purdon 1987). Employers bear the cost of these benefits and the PWCA protects them from other tort liability for work-related accidents. 77 Pa. Con. Stat. Ann. § 481(a). *Kohler v. United States*, 602 F. Supp. 747, 748 (W.D. Pa.), aff'd, 779 F.2d 43 (3d Cir. 1985).

Generally, only employers standing in a direct master-servant relationship with an injured worker may be liable for workmen's compensation benefits. But a narrow statutory exception to this principle provides that, under certain very limited circumstances, an employer not standing in a direct master-servant relationship with an injured worker may nonetheless become liable for workmen's compensation benefits. The exception, which creates

the status of a so-called "statutory employer," is embodied in section 203 of the Workmen's Compensation Act:

> An employer who permits the entry upon premises occupied by him or under his control of a laborer or an assistant hired by an employee or contractor, for the performance upon such premises of a part of the employer's regular business entrusted to that employee or contractor, shall be liable to such laborer or assistant in the same manner and to the same extent as to his own employee.

77 Pa. Con. Stat. Ann. §§ 52, 462 (Purdon Supp. 1990).

Sixty years ago this somewhat opaque statutory provision was translated by the Pennsylvania Supreme Court, in the leading case of *McDonald v. Levinson Steel Co.*, 302 Pa. 287, 294-95 (1930), into serviceable language which, to this day, remains the governing rule:

> To create the relation of statutory employer under section 203 of the act (77 PS § 52), all of the following elements essential to a statutory employer's liability must be present: (1) An employer who is under contract with an owner or one in the position of an owner. (2) Premises occupied by or under the control of such employer. (3) A subcontract made by such employer. (4) Part of the employer's regular business is entrusted to such subcontractor. (5) An employee of such subcontractor.

Ordinary employers who, under the Workmen's Compensation Act, are required to provide workmen's compensation benefits for those with whom they are in a direct master-servant relationship, are, of course, given by the Act the quid pro quo of immunity from tort liability for the work-related injuries of their employees. The Act does not in terms provide statutory immunity for statutory employers. But the courts of Pennsylvania have fashioned a cognate common law immunity. The test of eligibility

for such immunity is the five-element test of statutory employer status prescribed by *McDonald*, *supra*. The Pennsylvania Supreme Court has insisted that the test be complied with in every particular -- an insistence evidently born of the court's concern that some employers will endeavor "to escape the effect of the Compensation Act so that they will not be compelled to pay compensation or carry insurance, and, on the other hand . . . when faced with liability at common law . . . strive vigorously to come under the sheltering protection of the act." *McDonald*, 302 Pa. at 292. To allay this concern, the Supreme Court of Pennsylvania determined that (*ibid.*):

> It will be better for the efficient administration of the Compensation Act to construe it literally as to the obligations created leaving those under the common law that were apparently intended to be so, and under the Compensation Act those intended.

Heeding the admonition of the Supreme Court, the Superior Court has rigorously patrolled claims of statutory employer status. "These [*McDonald*] criteria must be applied strictly, particularly where an allegedly negligent contractor seeks asylum from common law liability." *Travaglia v. C.H. Schwertner & Son*, 570 A.2d 513, 518 (Pa. Super. 1989). *See also*, *Stipanovich v. Westinghouse Electric Corporation*, 231 A.2d 894 (1967).

In this case the parties have stipulated that the first four *McDonald* elements are satisfied. That is to say, the parties are in agreement that (1) defendant Kane entered into a contract with the Forest Service authorizing Kane to cut timber from a forest tract managed by the service; (2) Kane thereupon exercised control over the tract; (3) Kane entered into a subcontract with Nortim under which the latter was to arrange for the actual logging operations; and (4) Kane thereby entrusted a portion of its "regular business" to Nortim. The remaining issue is whether the fifth McDonald element is met -- *i.e.*, whether plaintiff Rolick was "[a]n employee of . . . subcontractor" Nortim.

B.

When our jurisdiction is based upon diversity, we must ascertain and apply state law. When presented with a novel issue of law, or where applicable state precedent is ambiguous, absent or incomplete, we must determine or predict how the highest state court would rule. *Erie Castings Company v. Grinding Supply, Inc.*, 736 F.2d 99, 100 (3d Cir. 1984). Here, where the issue before us falls outside the scope of precise issues on which the Pennsylvania Supreme Court has spoken, proper regard must also be given to the decisions of its intermediate appellate court. *Burke v. Maassen*, 904 F.2d 178, 184 (3d Cir 1990).

> An intermediate appellate state court . . . is datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.

West v. AT&T Company, 311 U.S. 223, 237 (1940). *See also Wisniewski v. Johns Manville Corporation*, 759 F.2d 271, 273-74 (3d Cir. 1985) (although lower state court decisions are not controlling on an issue on which the highest court of the state has not spoken, federal courts must attribute significant weight to these decisions in the absence of any indications that the highest state court would rule otherwise).

Unfortunately, sections 52 and 462 do not define "employees," but simply refer to persons in employment situations as "laborers" or "assistants." The district court relied upon *Qualp v. James Stewart Company*, 266 Pa. 502, 109 A. 780 (1920), to supply the legal definition of "employee" as used in the fifth *McDonald* requirement. Its reliance was misplaced. The Pennsylvania Supreme Court stated in *Qualp* that 77 Pa. Con. Stat. Ann. §§ 52 and 462

> intended to include those laborers or employees [sic] who did work in furtherance of the employer's business . . . a laborer

> hired by a contractor for the performance of a part of the employer's regular business entrusted to that contractor.

Qualp, 109 A. at 781.

Qualp thus was concerned only with what would become the fourth element of the *McDonald* test -- that the laborer be hired to perform work that is part of the statutory employer's regular business. *Qualp* did not address the scope of the term "employee" as it was used later in the fifth prong of *McDonald*. Moreover, "the holding in *Qualp* . . . has been drastically changed by the requirements set forth in *McDonald*." *Travaglia*, 570 A.2d at 518. Hence, for a definition of employee, we must begin with *McDonald* itself.

In *McDonald*, Levinson Steel Company erected a building on leased land. It contracted with one Uhl to erect the steel. McDonald, an employee of Uhl, was injured on the job and sued Levinson in a common law negligence action. The issue in *McDonald* is the third element: Is Uhl a subcontractor of Levinson? The court held that Uhl was an independent, not a subcontractor of Levinson. It concluded that because "there is no question of control or supervision" such as would create a master-servant relationship between Levinson as master and Uhl, and, consequently, Uhl's employees as servants, Levinson was not liable to McDonald for compensation under the act. It stated the test to be employed as, "unless the relation of master and servant is established by the contract reserving control over the means of accomplishing the work as well as the result to be accomplished . . . a workman injured on that work is not entitled to compensation from the . . . statutory employer . . ." under the act. *McDonald v. Levinson*, 153 A. at 427, citing *Brooks v. Buckley and Banks*, 292 Pa. 1, 139 A. 379 (1927).

Here the issue is the fifth element: Is Rolick an employee of Nortim? But the answer still depends upon Nortim's right to control the means or method by which Rolick performs his work

as well as the result to be accomplished. *Rich Hill Coal Company*, 7 A.2d at 311 (1939) ("The relationship of master and servant exists where the employer has the right to select the employee, the power to remove and discharge him, and the right to direct both what work shall be done and the way and manner in which it shall be done.) It is not necessary that Nortim actually exercise control over Rolick's work methods, only that it has the right to do so. *Rodgers v. P-G Publishing Co.*, 194 Pa. Super. 207, 166 A.2d 544, 546 (1960).[1] Hence, if Nortim did not possess the right to control Rolick's work methods, then Rolick and Nortim were independent contractors with each other, and Kane, the principal contractor, may not rely on the statutory employer defense. *See Sechrist v. Kurtz Bros.*, 147 Pa. Super. 214, 24 A.2d 128, 130-131 (1942). Control depends upon the particular facts of each case. *Capozzoli v. Stone & Webster Engineering Corp.*, 352 Pa. 183, __, 42 A.2d 524, 525 (1945); *Swartz v, Eberly*, 212 F. Supp. 32, 34 (E.D. Pa. 1962) (non-PWCA case). *See Babich v. Pavich*, 270 Pa. Super, 140, _, 411, A.2d 218, 220-221 (1979) (above rule applied in determining employer immunity under 77 Pa. Con. Stat. Ann. § 72).

C.

We conclude that Rolick was an independent contractor rather than Nortim's employee. Although the Cutting and Hauling Agreement required Rolick to cut logs in a certain manner and to certain specifications, these are either safety or end-product requirements and do not represent rights to control Rolick's work methods. Rolick set his own hours, provided his own tools, hired

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[1] Admittedly, *McDonald* did not elaborate on the scope of the term employee for purposes of the fifth prong. In the absence of any indication to the contrary, we must assume, however, that *McDonald* intended the term employee to be given its ordinary common law meaning, *i.e.*, that a master-servant relationship exists.

his own workers, and accomplished the desired results, all by his own methods.

The Cutting and Hauling Agreement also supports Rolick's status as an independent contractor since it states both that Rolick is an "independent contractor" and that he will be "solely responsible for the methods used and the manner with which all [his] obligations . . . are fulfilled." App. at 120A, ¶ 9. Although the "courts will not be controlled by the nomenclature the parties apply to their relationship," *Capozzoli*, 352 Pa. at __, 42 A.2d at 525, a combination of the Cutting and Hauling Agreement with these facts confirm the independent relationship and purpose the agreement describes. The entire contact, the respective rights and duties it created, the actual relationship of the parties established by the facts, the parties' intent and their actions bespeak only an independent contractor relationship between Nortim and Rolick.

Nor do Nortim's monitoring and safety procedures change our conclusion. "The law of Pennsylvania makes it clear that one who employs and independent contractor may also employ a person to ascertain that the work is done according to plans and specifications and that the employment of such a person in no way indicates that the independent contractor is being subjected to control." *Fisher v. United States*, 441 F.2d 1288, 1291 (3d Cir. 1971).

Likewise, other facts facially appearing to support an employer-employee relationship, on closer examination, do not. Indeed, Nortim provided workmen's compensation insurance coverage for Rolick and Rolick took full advantage of that coverage. But that fact is of little help since the coverage was optional, Nortim merely made it available at group rates, and Rolick actually paid for it. *See Gailey v. State Workmen's Insurance Fund*, 286 Pa. 311, 133 A.2d 498 (1926) (existence of worker's compensation insurance for benefit of worker some evidence, but not controlling).

III. CONCLUSION

On balance, we conclude that Nortim did not retain any control over Rolick's work methods and that Rolick had exclusive control of the manner of performing the work. The district court decision that Rolick was a statutory "employee" of Nortim is incorrect; Rolick is an independent contractor.[2] Kane cannot benefit from the PWCA statutory employer defense. The judgment of the district court will be reversed.

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[2] Since we conclude that Rolick is not covered under sections 52 and 462 of the PWCA, we likewise hold that he is not an "employee" under 77 Pa. Con. Stat. Ann. § 461.

Supreme Court, U.S.
FILED
FEB 10 1993
OFFICE OF THE CLERK

No. 92-1233

In The

Supreme Court of the United States

October Term, 1992

COLLINS PINE COMPANY AND COLLINS PINE COMPANY, t/d/b/a/ KANE HARDWOOD DIVISION,

Petitioners,

v.

WILLIAM R. ROLICK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT WILLIAM R. ROLICK

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QUESTION PRESENTED

Whether, in a common law diversity action alleging negligence, the admission of an OSHA regulation as non-binding evidence of a standard of care owed by a possessor of land to an injured independent contractor contravenes 29 U.S.C. § 653(b)(4)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT 1

REASON FOR DENYING THE PETITION 5

THE DECISION OF THE COURT OF APPEALS NEITHER CONFLICTS WITH THE EXPRESS DIRECTIVES OF OSHA NOR THE DECISIONS OF OTHER CIRCUITS REGARDING OSHA'S PROHIBITION AGAINST USING THE REGULATIONS TO ENLARGE OR OTHERWISE AFFECT AN EMPLOYER'S COMMON LAW LIABILITY 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Barrera v. E.I. DuPont De Nemours & Co., Inc., 653 F.2d 915 (5th Cir. 1981) 6

Melerine v. Avondale Shipyards, Inc., 659 F.2d 706 (5th Cir. 1981) 6

Merritt v. Bethlehem Steel Corporation, 875 F.2d 603 (7th Cir. 1989) 6

Minichello v. U.S. Industries, Inc., 756 F.2d 26 (6th Cir. 1985) 6

National Marine Service, Inc. v. Gulf Oil Co., 433 F.Supp. 913 (E.D.La. 1977) affirmed 608 F.2d 522 (5th Cir. 1979) 6

Rolick v. Collins Pine Co., 925 F.2d 661 (3d Cir. 1991) 2

Rolick v. Collins Pine Co., 975 F.2d 1009 (3d Cir. 1992) 5, 6

Teal v. E.I. DuPont De Nemours & Co., 728 F.2d 799 (6th Cir. 1984) 6

FEDERAL REGULATIONS

29 C.F.R. § 1910.266(c)(3)(ii) 4

MISCELLANEOUS

American Pulpwood Association, *Safe Manual Felling* (1983) 4

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COLLINS PINE COMPANY AND COLLINS PINE COMPANY, t/d/b/a/ KANE HARDWOOD DIVISION,

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v.

WILLIAM R. ROLICK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION OF RESPONDENT WILLIAM R. ROLICK

William R. Rolick respectfully opposes the petition for writ of certiorari to review the order of the United States Court of Appeals for the Third Circuit entered in this case on September 23, 1992.

STATEMENT

On August 23, 1983, Petitioner, a company extensively involved in harvesting timber, entered into a Timber Sale Contract with the United States Department of

Agriculture's Forest Service to purchase, cut and remove (clearcut) from a certain area of the Allegheny National Forest designated as Turkey Ridge all timber meeting or exceeding contract specification. (R.13A-62A).

On October 1, 1984, Petitioner entered into a Logging Services Agreement with Nortim Corporation ("Nortim"), a logging insurance group, whereby Nortim was to perform various services in connection with the logging operations on Turkey Ridge, including the selection, hiring and scheduling of independent subcontractor loggers to cut and remove the timber. (R.63A-71A); *Rolick v. Collins Pine Co.*, 925 F.2d 661, 662 (3d Cir. 1991).

On October 1, 1984, Respondent entered into a Cutting and Hauling Contract with Nortim under which he was to work the second block of the Turkey Ridge tract by cutting and hauling timber that Petitioner had previously agreed to purchase from the Forest Service (R.72A-83A); Respondent had executed a similar contract with Nortim the previous year and worked the first block of Turkey Ridge at that time.

It was Petitioner's decision alone under the Timber Sale Contract to have the second block of Turkey Ridge opened and harvested by Respondent in January 1985.[1] (R.254A-258A). Respondent was working at Turkey Ridge on the morning of January 14, 1985 when he was struck

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[1] To obtain possession of a block of the premises, Petitioner had to prepay the Forest Service for the timber located thereon before actual harvesting operations could be conducted. Petitioner chose to prepay and harvest this second block of Turkey Ridge in January 1985, a time when all trees (living, dying and dead) were without leaves.

from behind across the neck and back by a falling birch tree which had been standing approximately 30 feet away. Respondent was rendered quadriplegic. (R.8A-11A).

At trial, Respondent presented evidence that the birch tree was dead and/or rotted to such an extent that it presented a hazard, and that this condition had existed for some period of time preceding Respondent's entry onto the land. In fact, the evidence was that the tree's hazardous condition would have been readily observable in the spring, summer and fall of 1984 by, among other things, its lack of leaves. (R.313A-318A, 340A-342A, 360A-362A).

It is Respondent's contention that had Petitioner, as the possessor of land, complied with logging industry standards requiring preliminary inspection of land and identification and/or removal of hazardous trees before the start of logging operations, Respondent, a business visitor upon the land, would have been forewarned of the hazardous condition of the birch tree and Respondent's devastating injury prevented.

On October 21, 1991, Petitioner filed a motion in limine which was granted by order of the district court (without opinion) on November 1, 1991. Under that order, Respondent was precluded from introducing into evidence, or making any reference whatsoever at trial, including in the testimony of Respondent's logging industry expert, to pulpwood logging regulations and standards promulgated by the Occupational Safety and Health Administration ("OSHA"), by the American National Standards Institute ("ANSI"), and/or by statutes of the states of Washington and Oregon. (R.84A-85A, 87A).

In accordance with the district court's ruling, this action was tried before a jury beginning November 4, 1991. At trial, Respondent's logging industry expert, Dr. Herbert I. Winer, whose report of September 9, 1988 relied heavily on the OSHA, ANSI, Oregon and Washington regulations, standards, and/or statutes to establish the standard of care applicable to Petitioner, was precluded from making any reference whatsoever to those regulations, standards and/or statutes. (R.99A-141A). Because of the district court's ruling in limine, Dr. Winer, when pointing to logging safety standards containing language which required the preliminary identification and/or removal of hazardous trees prior to the commencement of logging operations, was restricted to citing only a 1983 American Pulpwood Association ("APA") publication.[2] However, unlike the precluded industry-wide OSHA and ANSI standards, APA regulations are directed only to members and Petitioner was not an APA member.[3]

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[2] The actual publication, *Safe Manual Felling*, was offered into evidence during Respondent's case in chief and refused by the district court because it contained the precluded OSHA regulation, 29 CFR § 1910.266(c)(3)(ii). (R.169A, 383A-384A).

[3] The inapplicability of the APA version of this standard to Petitioner was made apparent at trial by the following questioning of Dr. Winer by the district court:

> THE COURT: All right, I think you said this [APA] material you were referring to spelled out very explicitly what should be done to remove the hazards; is that correct?
>
> A. Yes. Your Honor.
>
> THE COURT: But I think you also said *it did not address itself to whose obligation it was to remove the hazard,* but your own professional opinion is that it

On November 8, 1991, the jury returned a verdict for Petitioner based on a specific finding of "no negligence" and judgment was then entered for Petitioner. (R.89A-92A).

The Court of Appeals vacated the district court's judgment holding that the district court had abused its discretion in excluding the OSHA regulation as non-binding evidence of the standard of care which Respondent alleged was owed to him by Petitioner. *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1014 (3d Cir. 1992).

REASON FOR DENYING THE PETITION

THE DECISION OF THE COURT OF APPEALS NEITHER CONFLICTS WITH THE EXPRESS DIRECTIVES OF OSHA NOR THE DECISIONS OR OTHER CIRCUITS REGARDING OSHA'S PROHIBITION AGAINST USING THE REGULATIONS TO ENLARGE OR OTHERWISE AFFECT AN EMPLOYER'S COMMON LAW LIABILITY

Petitioner fails to appreciate the significant distinction between OSHA regulations being offered as non-binding versus binding evidence of a standard of care in

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includes everyone that is involved with the land on which the hazard is located. Is that a fair statement?
A. That is correct, Your Honor.
THE COURT: Would that portion of your testimony comes [sic] from your professional experience and not from this material which you referred to, *which identified how to do it but not who should do it?*
A. That is correct, Your Honor (emphasis added). (R.140A).

common law negligence actions. See *Rolick v. Collins Pine Co.*, 975 F.2d 1009, 1013-15 (3d Cir. 1992) (App. 8a-12a).

While there does appear to be a division among the federal judicial circuits in cases where OSHA regulations have been offered as binding evidence (i.e., negligence *per se*) of a standard of care in common law negligence actions,[4] no such conflict exists where the OSHA regulations are merely offered as evidence which the jury is ultimately free to accept or reject. *Melerine v. Avondale Shipyards, Inc.*, 659 F.2d 706, 713 n.22 (5th Cir. 1981) (plaintiff may properly offer OSHA regulation as evidence of defendant's negligence even when regulation cannot be used to establish negligence *per se*); *Barrera v. E.I. DuPont De Nemours & Co., Inc.*, 653 F.2d 915, 920-21 (5th Cir. 1981) (error in court's charge as to duties to invitees created by OSHA was ameliorated by later description of OSHA regulation as mere standard relevant to deciding what constituted negligence); *National Marine Service, Inc. v. Gulf Oil Co.*, 433 F.Supp. 913, 919 (E.D.La. 1977), affirmed 608 F.2d 522 (5th Cir. 1979) (OSHA regulation may be referred to as guide for the determination of standard of care). *Cf., Merritt v. Bethlehem Steel Corporation*, 875 F.2d 603, 608 (7th Cir. 1989) (whether safety standards of OSHA apply to landowner-contractee relationship is issue not necessary to resolve as Indiana workers' compensation law provided plaintiff's exclusive remedy); *Minichello v. U.S. Industries,*

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[4] Compare *Barrera v. E.I. DuPont De Nemours & Co., Inc.*, 653 F.2d 915, 920 (5th Cir. 1981) with *Teal v. E.I. DuPont De Nemours & Co.*, 728 F.2d 799, 805 (6th Cir. 1984).

Inc., 756 F.2d 26, 29 (6th Cir. 1985) (to use OSHA regulations to establish whether product is unreasonably dangerous is improper).

Since the Court of Appeals expressly decided that the OSHA regulation at issue could only be admitted as non-binding evidence of Petitioner's standard of care, Petitioner fails to state any reason for this Court to exercise its discretion and grant the requested review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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